

**CONSTITUTION OF KENYA REVIEW COMMISSION
(CKRC)**

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

Verbatim Report of

**PLENARY PROCEEDINGS
HELD AT THE PLENARY HALL – BOMAS OF KENYA**

ON

13TH FEBRUARY 2004

CONSTITUTION OF KENYA REVIEW COMMISSION

**NCC – PLENARY PROCEEDINGS HELD AT THE PLENARY HALL,
BOMAS OF KENYA ON 13TH FEBRUARY 2004**

PRESENT:

Koitamet Ole Kina	-	Chairman
Com. Okoth Ogendo	-	Rapporteur General
P L O Lumumba	-	Secretary

Hon. Delegate Koitament Ole Kina: Good morning Honourable Delegates. May I ask those who are coming in please to settle? May I call this meeting to order, I will ask Arch Bishop Njue to lead us in prayers. After the three prayers we are going to have the National Anthem, so we are having Arch Bishop Njue, Sheikh Ali Shee and Mrs. Nancy Iyadi. Please, let us rise up for prayers.

Hon. Delegate Arch Bishop Njue: In the name of the Father and of the Son and of the Holy Spirit. Amen. Oh God of all creation bless this our land and nation. Father in Heaven, we thank You once again for giving us this opportunity to be together as representatives coming from the various parts of our country. We have come to put our heads together and to assist in the making of a new Constitution. Lord, enlighten us so that whatever we come up with in this Constitution must be that which respects the dignity of each and every Kenyan. We ask You Lord to give us the spirit of humility, the spirit of acceptance of divergent views and to give us also that spirit of reconciliation. May You walk with us Lord so that at the end of the day we may be able to give Kenyans a Constitution that will be meaningful and last for generations to come. Be with us even in this session and be with us even as we go into our Tents so that whatever we do may be in accordance with your will. We ask these through our Lord Jesus Christ Your Son who lives and reigns with You in the unity of the Holy Spirit, one God forever and ever. Amen.

Hon. Delegate Sheikh Ali Shee: *Bismilahi Rahman Rahim. Kwa jina la Muumbaji Mola Mkarimu tuko mbele yako tukiwa wanyonge, wanyenyekevu. Tukiwa na haja na kuungwa mkono na wewe. Ewe Mola kwanza tunatoa shukrani zetu kwako kwa kutulinda na kulinda watu wetu*

ambao waliopewa majukumu walioenda Mombasa na wakarudi salama, tunatoa shukrani kwa ulinzi huo uliotoa kwa watu wetu hawa. Mola vile vile tunatoa shukrani zetu kwa ulinzi ambao uliotoa kwa Wajumbe wote ambao wako kwenye Boma ya Kenya. Wajumbe hawa Mola ni viongozi ambao wamechaguliwa na watu wako kufanya kazi ya kuandika Katiba ambayo itawalekeza raia wako na wananchi wako wa nchi hii katika hali iliyobora, hali ya maendeleo, masikizano na mafanikio ya nchi hii.

Mola endelea kutupa uwezo kama huo, busara na hekima zitawale akili zetu. Hamasa na hasira ziwe zimetawaliwa na akili. Ewe Mola tunakuomba vile vile adui wetu mkubwa shetani na matamania yetu yote tuyaweze kuya-control na kuyathabiti ili tuweze kufanya kazi tukitawaliwa na hekima na akili. Ewe Mola, wale wenzetu ambao waiangalia kazi hii kwa jito ambalo si nzuri, uwape busara na hekima na akili waweze kubadilisha mawazo yao na kuiyaangalia kazi hii kwa uwangalifu wa aina ingine. Mola tukiwa waja wako wanyonge bila shaka makosa tunayafanya na tunapofanya makosa wewe ndiye mwenye kusemehe makosa kama yale na kuyabadilisha uyaweke katika hali iliobora zaidi. Mola utulinde, ulinde nchi yetu, ulinde wananchi wetu na kila jambo ambalo si nzuri utuepushe nalo Ewe Mola. Tunakuomba wewe ndiye mwenye kuombwa hakuna mwingine. Baraka zako ziteremke kwetu. Amin.

Hon. Delegate Nancy Iyadi: Our Heavenly Father, we come to You this morning with a lot of thanksgiving. Thank you Lord for the gift of life. We are gathered here Father to make a Constitution for the people of this country. Bless us Oh, Lord, give us wisdom, guidance so that we deliver a people friendly Constitution. Almighty God, there is nothing impossible before you. We thank you for this day and we believe that you will guide us in today's deliberations. In Jesus Name I pray. Thank you.

(National Anthem played by a band).

Hon. Delegate Koitamet Ole Kina: May I call upon Reverend Oginde to come and take his oath. Reverend Oginde, are you around? It appears Reverend Oginde is not around so we will do it on another day.

P L O Lumumba: The Reverend Oginde is not in. Ladies and Gentlemen we want to take this opportunity to give you a general guide on how the day will proceed. First we want to announce

that we have as at this morning received official communication from Magadi Soda inviting those who desire to visit to do so and we are suggesting that the visit takes place on Monday. We have already placed a list outside. Those who desire to visit are requested to write their names to help us organize transport and other logistics.

Today's programme is as follows: The Chairman will after these announcements communicate briefly then the Honourable Professor H. W. Okoth Ogendo will give you a report on what transpired in Mombasa. Thereafter you shall proceed to your Tents as you did yesterday to conclude the work that you are engaged in. The Women Delegates meanwhile have a Tent reserved for them as per their request and they will meet at the *Nyama Choma Banda*. I am also asked to announce that Group IV made up of Committees J, K, L and M will meet in the Finance Committee at 9.00 am or immediately after this to finalize their work.

At about lunchtime or immediately after lunchtime we will be ready to facilitate you in the usual manner. Our people will be here by Noon so that we do not have a repeat of the tardiness that we experienced last week. As regards the overall programme, we now have a programme which has been adopted as at this morning and which had been earlier communicated. The programme runs up to the 19th Day of March. We are in the process of photocopying the programme and hopefully when you leave as you walk to your Tents the programme will be ready for you to see. The programme speaks for itself save to point out that on Monday there will be no substantive engagement because we will be consolidating the Draft which will form the subject of your deliberations on Tuesday and Wednesday's in the Tents.

So to read the programme just for those two days is as follows:

- Monday the 16th Day of February – Consolidation of annotated Zero Draft. It is on that day that we will take the window to visit Magadi for those who desire.
- On Tuesday February the 17th - Reconsideration of specific issues in Technical Committees from 9.00 to 5.00 pm.
- On Wednesday February the 18th – We continue with our exercise, reconsideration of specific issues in Technical Committees.

- On Thursday the 19th Day of February - Presentation of Reports by Technical Committees for consideration by the Committee of the whole.

I stop there knowing as I do that so soon after this programme you will receive the entire programme to read it for yourselves. Lastly, I am asked to announce to all Christian to meet at the Kenya Church prayer Tent at 12.30 pm. This announcement is courtesy of Delegate number 468, H. J. Yego. With that, I now wish to hand over to the Chairman *protem* and the Vice Chair Mr. Ole Kina wishing you as I must, a happy and safe weekend. God bless you. (**Clapping**).

Hon. Delegate Koitamet Ole Kina: Thank you very much. After that eloquent and desirable communication from the Secretary I am left with very little to say other than ask the Conference Delegates to continue being faithfully to their work. We are very happy because of the commitment you have shown and request you not to be excited by what you read in the Newspapers because communication from the Conference is done to you directly and not through the media and so if you read anything disturbing do not make it a subject of our discussion here because I saw quite a number of Delegates who are anxious because of what they are reading in the *Standard Newspaper*. So to make sure that you do not have those worries, I would like to invite the Rapporteur General to communicate to the Conference what we did in Mombasa. Thank you. The Rapporteur General.

Com. Okoth Ogendo: Thank you very much, Chairman. Fellow Delegates, under Cap 3A that we are operating under, this is an open and transparent process, it is therefore important that we should communicate every stage of the process that we take to the Delegates so that there is no undue misunderstanding. The retreat in Mombasa between the 2nd and the 11th was a Conference activity that took together all the Convenors and all the Rapporteurs and the Technical staff of the Conference to perform certain specific functions. The first, we went to complete the reports of all Committees incorporating all decisions made by those Committees. Many of you will understand that some Committees were not able to complete their reports, they completed their work but they were not able to complete the reports accurately reflecting what decisions they had already made. It was important therefore that they should do so.

Secondly, we wanted to have Convenors present their reports to each other, to the meeting consisting of Convenors and Rapporteurs in the form of a common template which had been designed and was published in my report on Bomas II and that template indicates how the provisions of the Draft Bill which were published by the CKRC have been treated by the various Committees. So in the template you will be able to see a column that reproduces the original Draft and a column that reproduces the decisions that Committees have made and an explanatory column that indicates exactly how they arrived at those decisions. We wanted to present those reports to all the Rapporteurs and the Convenors.

Thirdly, we went there to debate those reports with a view firstly to harmonizing the recommendations that are made by Committees internally and across the board. It is clear that as Committees made their decisions there was no time to harmonize even decisions within Committees and therefore it was important that Committees should have their reports harmonized and then the report must also be harmonized from Committee to Committee because there were cases in which decisions made by one Committee tended to conflict with or contradict decisions made by other Committees and it was important to harmonize those.

It was also important to identify crosscutting issues and to mainstream them in the amended Draft of various Committees. The most important crosscutting issues that we are dealing with are Culture, Affirmative Action and Devolution and it was important that these ones should be very carefully mainstreamed across Committees. It was also important that we should identify overlaps, repetitions, redundancies and to eliminate these or to rationalize them because many Committees, although not dealing strictly with the same issues, made recommendations that created overlaps and redundancies and it was important that this should be identified, rationalized and eliminated.

Finally, we wanted to consolidate and agree on an authentic Zero Draft incorporating decisions of Committees. A Zero Draft is simply a compilation of all the decisions that Committees have made irrespective of whether those decisions are in conflict with each other or unnecessarily rational. In other words is raw, it contains all the mistakes and the brilliances of Committees and it tells you that within two covers this is the decision that Committees have made. So when we talk about a Zero Draft it is far from being a first Draft and even further from being a final Draft. Now, what we were able to achieve in Mombasa are the following:-

First, the Convenors and Rapporteurs were able to see clearly what it will take to hammer all decisions made in individual Committees into a single comprehensive and coherent Draft Bill. When we come out of Bomas we are not going to come up with 13 different parts of a Constitution. We have to come out with a single comprehensive, coherent and rationalized Draft and it was important that Convenors and Rapporteurs should be able to see how that process can begin.

Secondly, they were able to identify the gaps in their work and therefore to lay down strategies for closing those gaps when they return to their Committees. They were able to consult with each other with a view to eliminating conflicts and overlaps if any. For example there are three different modules of the Senate that you will see in the Zero Draft. There is one module from Devolution, another one from the Legislature, another one from Culture. It was important that these ones should be harmonized because we are not going to have three different Senates, it is only going to be one and therefore the process of harmonization became extremely important and the Convenors and the Rapporteurs were able to at least take a serious crack at that process. They were also able to generally audit the work that they had presented in Committees and to ensure that what they did is in conformity with the principles of the Review as specified in Cap 3A.

In addition and of utmost importance the meeting did generate and certify a Zero Draft of a Bill. I want to call it Draft of a Bill rather than Draft Bill and that Draft, the authentic Zero Draft is dated February 11th 2004. I will not put it past some of us to doctor a Draft Bill and give it to the Newspaper and say that is what we did. If you are asking for the authentic Draft we have it both in hard copy and in soft copy and we have made arrangements to ensure that the master copy is not tampered with by anybody. So, whatever you read in the Newspapers if you have questions about it we are able to show you what the authentic Zero Draft is. We are also able to agree on the compendium of issues which will require reconsideration by Committees because as we sat and received Committee Reports it was quite clear that the final rationalization must go back to Committees so that Committees will be told you agreed on this but the other Committees have made better decisions which we think you ought to embrace. So there is a compendium of issues with each Convenor. Each Convenor has a compendium of issues that they will take to their own Committees

We were also able to instruct the Drafting Team on how they should begin to refine the Zero Draft in a simple language as possible in preparation for the Committee of the whole Conference. Consequently, as of this report, the following activities are in process. The Drafting team are reorganizing the Zero Draft with a view to ensuring logical ordering of Chapters, thematic aggregation of issues, accurate cross referencing and technical compilation of issues that may not be of constitutional value. We made a lot of decisions but many of those or rather not many but some of those decisions clearly belong to legislation. There are even others that belong to subsidiary legislation and the Drafters using their tremendous experience should be able to tell us what ought to be removed from the Draft Bill and what ought to go into legislation, and therefore go into legislation.

The Convenors and the Rapporteurs and the technical staff will meet again on Monday, February 16th to receive and to review the work of the Drafting Team, to debate and to agree on the timetable for the reconsideration of issues in Committees and I think the programme you are going to receive is saying that that process should be done on Tuesday and Wednesday and the Convenors and Rapporteurs will also agree on the timetable, the order and the format of presentation to the Committee of the whole Conference. We have to resolve whether or not we are going to come to the Committee of the whole Conference with individual Committee Reports, 13 of them or we are going to come with a single comprehensive Draft so that we can start walking through the process of making the final Draft.

The Steering Committee has agreed also that they will ensure that the Consensus Building Initiative concludes its work by Tuesday so that issues that they have resolved will be fed back into Committees for incorporation into Committee Reports. That is where we are at the moment and the way we see it therefore is that once reconsideration is complete we will then be able to move from Zero Draft to a first Draft and it is the first Draft which will be the basis of consideration by the Committee of the whole House. Once the Committee of the whole House has debated that first Draft, made its amendments and changes we then will produce a second Draft and in my calculation that second Draft ought to be the final Draft which will then come back to the Conference for formal adoption then we can sign the final Act of the Conference indicating that that indeed is the authentic final Draft. So that is where we are. Thank you very much.

Hon. Delegate Koitamet Ole Kina: Thank you, very much. Before we adjourn to our various Committees, I am informed that Rev. Oginde is here and is ready to take his Oath of Office.

Com. Prof. Okoth Ogendo: Mr. Chairman, the Report I have just read is going to be available for all the Delegates.

Hon. Delegate Koitamet Ole Kina: Rev. Oginde, please step forward. Okay, he is there. Please read the Oath.

Rev. David Oginde: “I, David Oginde, being appointed a Delegate to the National Constitutional Conference under the Constitution of Kenya Review Commission Act, do solemnly swear that I will faithfully and fully, impartially and to the best of my ability discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill will or prejudice and to the end that in the exercise of the functions and powers as such Delegate, I shall at all times be guided by the National interest. So, help me God”.

Hon. Delegate Koitamet Ole Kina: Thank you, and welcome to this Honourable gathering. Please sign your Oath and give it to us. So, we will adjourn to our various Committees to continue with the works that we had yesterday.

Hon. Delegate Raphael Livu Kilonzi: Point of Order.

Hon. Delegate Koitamet Ole Kina: 228.

Hon. Delegate Raphael Livu Kilonzi: Thank you, Chair. My name is Raphael Livu, Delegate number 228. Mr. Chairman, I would like to take on the last item of the Paper that was presented by the Rapporteur General. Mr. Chairman, my understanding is that, the consensus building initiative committee that was meeting elsewhere outside this Conference was not formally recognized by this Conference. I believe that it was an informal gathering whose views or decisions are not binding to this Conference. Mr. Chairman, the last item says that, the Steering ‘must’ I think instead of the word ‘must’ it should be ‘shall’, in that their decision is really not

binding on the deliberations of this Conference and I think, Mr. Chairman, further the word 'decisions' should also be replaced with the word 'deliberations'. Thank you, Chair.

Hon. Delegate Koitamet Ole Kina: Thank you, very much. I would like to remind the Conference that at this stage, we are building consensus and we have said that, those reports will be brought to the Committees. Therefore, let us not start causing friction by looking and saying, which word should not be used. We have the general feeling that we want and so, we will, I think we have heard that and it is clear what is going to happen and so, I would not like to belabour on that.

Hon. Delegate Levi Ahindikha: Point of Order.

Hon. Delegate Koitamet Ole Kina: 379.

Hon. Delegate Levi Ahindikha: Thank you, Mr. Chairman. My number is 379 and my name is Ahindikha Levi, District Delegate from Kakamega District. Mr. Chairman, Sir, although you have tried to empty the issue which is appearing in the paper today, Mr. Chairman, as far as Kenyans know, we are still debating the Draft and I am directing this Point of Order to the Media. Is it in order for the Media to suggest that we have delivered the final Draft? Is this not misleading the Kenyans? Thank you, Mr. Chairman.

Hon. Delegate Koitamet Ole Kina: Well, I said that we have the Media Committee and it is communicating to the Media House that wrote this and I hope that we are not going to make that a subject of debate because I said that, this Conference is not directed by debates or information that we read in the Media. The Rapporteur General has given you a report from Mombasa and that should be enough and in fact what we should do is to go to our Committees and go through that report and see whether there is any sense in what the Media has written. Therefore, please let us not go back to that. Unless there is anything else apart from that, I would not want to proceed in that direction.

Hon. Delegate David Marcos Rakamba: Point of Order.

Hon. Delegate Koitamet Ole Kina: 433.

Hon. Delegate David Marcos Rakamba: Mr. Chairman, I am standing on a Point of Order that is based on the regulations. Regulation 32 (1) (a). My names are David Marcos Rakamba. Mr. Chairman, under the privileges of this House, Mr. Chairman, I am also trying to bring to your attention, Mr. Chairman, Regulation 46 (3) (h), Mr. Chairman, that governs the work and functions of the Steering Committee, Mr. Chairman, you have dismissed a very serious issue that has been raised about consensus building. Mr. Chairman, we have all along insisted and said that the deliberations of any issue shall be held in Bomas, Mr. Chairman, and the issue you are bringing up is seriously going to affect this House if you say, that the consensus building which was formed without consulting this House by the Steering Committee is going to actually be taken to the Technical Committees. That is breaching the regulations that governs - -

Hon. Delegate Koitamet Ole Kina: I am - -

Hon. Delegate David Marcos Rakamba: - -the set up of this- -

Hon. Delegate Koitamet Ole Kina: Delegate: 590.

Hon. Delegate David Marcos Rakamba: - - this Steering Committee, Mr. Chairman. Thank you.

Hon. Delegate Patrick O. Onyango: Mr. Chairman, my names are Patrick O. Onyango, Delegate number 590. I wish to rise on this Point of Order to say that, it is not in Order. It is not proper for Honourable Delegates to introduce matters which are obviously calculated to delay our process in this Conference.

(Applause)

Hon. Delegate Koitamet Ole Kina: Yes.

Hon. Delegate Patrick O. Onyango: I am therefore proposing, Mr. Chairman, that the only proper order is for us to move to our Tents. Thank you.

(Applause)

